

1 Plaintiffs GIL CROSTHWAITE and JOHN BONILLA, in their respective capacities as
 2 Trustees of the OPERATING ENGINEERS HEALTH AND WELFARE TRUST FUND FOR
 3 NORTHERN CALIFORNIA, PENSION TRUST FUND FOR OPERATING ENGINEERS,
 4 PENSIONED OPERATING ENGINEERS HEALTH AND WELFARE TRUST FUND,
 5 OPERATING ENGINEERS AND PARTICIPATING EMPLOYERS PRE-APPRENTICESHIP,
 6 APPRENTICE AND JOURNEYMAN AFFIRMATIVE ACTION TRAINING FUND,
 7 OPERATING ENGINEERS VACATION AND HOLIDAY PLAN, OPERATING ENGINEERS
 8 CONTRACT ADMINISTRATION TRUST, OPERATING ENGINEERS MARKET
 9 PRESERVATION FUND, OPERATING ENGINEERS INDUSTRY STABILIZATION TRUST
 10 FUND, BUSINESS DEVELOPMENT FUND and HEAVY AND HIGHWAY COMMITTEE
 11 (“Plaintiffs”) and Defendants TRETHERWAY, INC. and TRACY GLENN PHILLIPS
 12 (collectively referred to as “Defendants”) do hereby stipulate and agree as follows:

13 **RECITALS OF FACT**

14 1. At all times relevant hereto, TRETHERWAY, INC., was, and is, bound to a written
 15 collective bargaining agreement with Operating Engineers Local Union No. 3 of the
 16 International Union of Operating Engineers entitled “INDEPENDENT Northern California
 17 Construction Agreement for Northern California”. The collective bargaining agreement
 18 incorporates by reference the Master Agreement For Northern California between the Operating
 19 Engineers Local Union No. 3 of the International Operating Engineers, AFL-CIO and
 20 Associated General Contractors of California, Inc., Association of Construction employers,
 21 Association of Engineering Construction Employers, Engineering and Utility Contractors
 22 Association and Industrial Contractors UMIC, Inc. (“Master Agreement”), and the Trust
 23 Agreements referenced in the Master Agreement.

24 2. Pursuant to the Master Agreement, TRETHERWAY, INC. is required to make
 25 contributions to each of the above-captioned Operating Engineers Trust Funds for each hour of

1 work performed by its employees, who are covered by the Master Agreement. The Operating
2 Engineers Trust Funds utilize a self-reporting system to collect contributions. The signatory
3 employers must submit monthly reports by the 15th day of the month after which the work
4 covered by the Master Agreement was completed indicating the number of hours worked by their
5 covered employees that month and the contributions owed as a result of such work being
6 performed. Failure to remit the contributions results in damages of fifteen percent of the
7 contributions being assessed against the employer. The principal of TRETHERWAY, INC.,
8 TRACY GLENN PHILLIPS, personally guaranteed the amounts payable by the Operating
9 Engineers Trust Funds to TRETHERWAY, INC. pursuant to TRETHERWAY, INC.'s collective
10 bargaining agreement with the Union and the Master Agreement and Trust Agreements
11 incorporated therein.

12 3. During the period beginning July of 2004 to date, the employees of
13 TRETHERWAY, INC. performed covered work based upon which TRETHERWAY, INC. reported
14 that TRETHERWAY, INC. owes the Operating Engineers Trust Funds the sum of \$121,102.61.
15 The calculation of the aforementioned liability is based solely on the Employer Reports of
16 Contributions remitted by TRETHERWAY, INC. indicating the number of hours in the relevant
17 month and contributions owed as a result of such work being performed. TRETHERWAY, INC.
18 failed to remit the payments owed for the corresponding Employer Reports of Contribution by
19 the fifteenth day of the month after which the work was performed. Therefore, the Defendants,
20 and each of them, owe liquidated damages and interest in the amount totaling \$106,442.42 to the
21 Operating Engineers Trust Funds.

22 4. In light of TRETHERWAY, INC.'s failure to pay contributions and liquidated
23 damages owed to the Operating Engineers Trust Funds, questions arose concerning the lack of
24 compliance by TRETHERWAY, INC. with the provisions requiring the prompt and correct
25 payment of all Trust Fund contributions. Good cause appearing, as a consequence, two audits

were conducted of TRETHEWAY, INC.'s books and records in accordance with the provisions of the Trust Agreements. The first audit revealed that TRETHEWAY, INC. owes unpaid fringe benefit contributions to the Trust Funds in the amount of \$17,187.40, and liquidated damages and interest in the amount of \$7,658.06, to the Plaintiffs based upon hours of work that were under-reported to the Trust Funds. The first audit also revealed that TRETHEWAY, INC. owes the Pensioned Operating Engineers Trust Funds the sum of \$53,780.93 based upon its violations of the provision of the Master Agreement that prohibits TRETHEWAY, INC. from hiring non-union subcontractors to perform covered work. The second audit revealed that TRETHEWAY, INC. owes unpaid fringe benefit contributions to the Trust Funds in the amount of \$12,620.76 and unpaid liquidated damages and interest in the amount of \$4,972.68 to the Plaintiffs. TRACY GLENN PHILLIPS is liable for the audit shortages pursuant to the personal guarantee described above. Demand was made for payment of the amounts determined to be due and owing pursuant to the audits, Defendants, and each of them, refused to pay such amounts.

5. The Trust Funds have incurred attorney's fees and costs in amount of \$7,823.00 relating to the above-captioned matter. Section 22.02.00 of the Master Agreement provides for the recovery of reasonable attorneys' fees and costs in an action to recover a delinquent balance due.

6. The parties hereto, with the intent to avoid the costs and time of litigation, agree as follows:

TERMS OF STIPULATION

7. Both TRETHEWAY, INC. and TRACY GLENN PHILLIPS agree that they owe the Operating Engineers Trust Funds the following amounts: (1) reported, delinquent principal contributions in the amount of \$121,102.61; (2) liquidated damages and interest in the amount of \$106,442.42 relating to reported, delinquent contributions; (3) unpaid principal contributions, liquidated damages and interest that the first audit revealed are owed by the Defendants in the total amount of \$24,845.46; (4) unpaid principal contributions, liquidated damages and interest

1 that the second audit revealed are owed by the Defendants in the total amount of \$17,593.44; (5)
 2 the sum of \$53,780.93 revealed as owed by TRETHEWAY, INC. by the first audit that is
 3 payable to the Pensioned Operating Engineers Health And Welfare Fund based upon its
 4 violations of the provision of the Master Agreement that prohibits hiring non-union
 5 subcontractors to perform work covered by the collective bargaining agreementand; and (6)
 6 attorney's fees and costs in the amount of \$7,823.00. **The Defendants, and each of them,**
 7 **agree that judgment will be entered against both TRETHEWAY, INC. and its principal,**
 8 **TRACY GLENN PHILLIPS, in this action in the amount of \$331,587.86.** Immediately after
 9 entry of the judgment, the Plaintiffs will establish lien rights in the their personal property by
 10 recording the judgment with the Secretary of State and in their real property by recording the
 11 judgment with the County Recorder of any and all counties where the Defendants, and each of
 12 them, may have, or obtain in the future real property.

13 **8.** The Plaintiffs agree not to levy against the personal or real property of the
 14 Defendants, if and only if, the Defendants timely make all payments required by paragraphs 9,
 15 10, 11 and 13 of this Stipulation.

16 **9.** Moneys from the Maxine Hong job totaling \$81,000.00 shall be paid by
 17 TRETHEWAY, INC. and/or TRACY GLENN PHILLIPS to the Operating Engineers as follows:
 18 (1) the sum of \$31,369.26 will be paid in September of 2006; (2) the sum of \$4,315.37 will be
 19 paid no later than October 10, 2006; (3) the sum of \$4,315.37 will be paid by October 22, 2006;
 20 and (4) the sum of \$41,000.00 will be paid no later than January 1, 2007. **All Payments under**
 21 **this paragraph will be by check made payable to "Operating Engineers Trust Funds" and**
 22 **directed to the attention of Tracy L. Mainguy at 1620 South Loop Road, Alameda,**
 23 **California.**

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1 **10.** TRETHERWAY, INC. and/or TRACY GLENN PHILLIPS will pay moneys paid
 2 to TRETHERWAY, INC. relating to the Elkgrove Job in the amount of \$58,000.00 to the
 3 Operating Engineers Trust Funds on or before January 1, 2007. **All Payments made under this**
 4 **paragraph will be by check made payable to “Operating Engineers Trust Funds” and**
 5 **directed to the attention of Tracy L. Mainguy at 1620 South Loop Road, Alameda,**
 6 **California.**

7 **11.** TRETHERWAY, INC. and/or TRACY GLENN PHILLIPS will pay the sum of
 8 \$139,366.65¹ to the Operating Engineers Trust Funds as follows. TRETHERWAY, INC. and/or
 9 TRACY GLENN PHILLIPS will pay the Operating Engineers Trust Funds the sum of \$7,500.00
 10 upon the execution of this agreement. TRETHERWAY, INC. and/or TRACY GLENN PHILLIPS
 11 will make an additional payment of \$7,500.00 to the Operating Engineers Trust Funds on or
 12 before November 30, 2006. Thereafter, Defendants will make monthly installment payments in
 13 the amount of \$6,600.00 per payment. The \$6,600.00 installment payments commence on
 14 December 15, 2006, and thereafter are due on the 15th day of each consecutive month thereafter,
 15 until the total amount paid under the Stipulation, which equals \$278,366.65², is paid in full. **All**
 16 **Payments made under this paragraph will be by check made payable to “Operating**
 17 **Engineers Trust Funds” and directed to the attention of Tracy L. Mainguy at 1620 South**
 18 **Loop Road, Alameda, California.**

19 **12.** Failure to make any of the payments required under paragraphs 9, 10, and /or 11
 20 of this Stipulation in a timely manner constitutes a default of the Defendants’, and each of their,
 21 obligations under this agreement. In the event that the Defendants are in default, then the

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 23 ¹ This figure was calculated as follows: delinquent, reported principal balance on the account (\$121,102.61), plus
 24 the total liability for the two payroll audits (\$96,219.83), less the amounts payable under paragraphs 9 and 10 of the
 25 Stipulation from the Maxine Hong and Elksgrrove Job, respectively (\$81,000 + \$58,000), plus one half of the
 outstanding liquidated damages and interest (\$53,221.21), plus Plaintiffs’ attorney’s fees and costs relating to the
 above-referenced lawsuit (\$7,823.00) [\$121,102.61 + \$96,219.83 - \$81,000.00 - \$58,000.00 + \$53,221.21 +
 \$7,823.00].

² This figure includes the amounts payable from the Maxine Hong Job and the Elksgrrove Job.

1 Plaintiffs, without notice to the Defendants, will immediately have the right to take any all legal
2 steps, by levy or otherwise, to execute and collect the judgment in the amount remaining
3 unsatisfied against TRETHEWAY, INC. and/or TRACY GLENN PHILLIPS.

4 13. From the date of the execution of this Stipulation forward, the Defendants, and
5 each of them, agree to comply with the requirements contained in applicable Trust Agreements
6 by submitting on or before the 15th day of the day after the end of the month, both an Employer
7 Report of Contributions detailing the individuals who performed work covered by the
8 THRETHEWAY, INC.'S collective bargaining agreement with Operating Engineers Local
9 Union No. 3, the number of covered hours worked during that work month and the amount owed
10 to the Operating Engineers Trust Funds as a result, along with a check made payable to the
11 "Operating Engineers Trust Funds" for the corresponding amount due. In the event that
12 TRETHEWAY INC.'S employees do not perform any covered work during a particular work
13 month, then, and in that event, the Defendants, on or before the 15th day of the day after the end
14 of that work month, shall submit an Employer report of contributions indicating that no covered
15 work was performed. Failure to make any payment due under this paragraph, and the collective
16 bargaining agreement and trust agreements referenced in the collective bargaining agreement, by
17 the twenty-fifth (25th) day of the month in which it was originally due will constitute a default of
18 the terms of this Stipulation. In the event that the Defendants are in default, then the Plaintiffs,
19 without notice to the Defendants, will immediately have the right take any all legal steps, by levy
20 or otherwise, to execute and collect the judgment in the amount remaining unsatisfied against
21 TRETHEWAY, INC. and/or TRACY GLENN PHILLIPS.

22 14. If and only if the Defendants, and each of them, make each of the payments
23 described in paragraph 9, 10, 11 and 13 of this Stipulation in a timely manner, and do not default
24 under their obligations stated in paragraph thirteen (13) of this Stipulation for a year, then the
25 Plaintiffs will waive liquidated damages and interest in the amount of \$53,221.21, which is one-

1 half of the \$106,442.42 of liquidated damages and interest owed to Plaintiffs by Defendants, and
2 each of them.

3 15. Defendant, and each of them, will bear its own legal costs, if any, associated with
4 the above-captioned matter. In the event that the Defendants default on any of the obligations set
5 forth in paragraphs 9, 10, 11 and/or 13 in of this Stipulation, then Plaintiffs are entitled to amend
6 the judgment entered to include the amount of their reasonable attorney's fees relating to this
7 matter and their reasonable attorney's fees incurred as a result of the Defendants' breach(s).

8 16. Both parties had the opportunity to review the terms of this Stipulation with legal
9 counsel of their choice before executing it, and entered the Stipulation voluntarily after reading
10 the entire Stipulation.

11 17. Fax signature of the parties to this Stipulation and their counsel, if any, shall be
12 valid and enforceable. This document may be executed in counterparts.

13 18. This Agreement shall be binding upon the parties, and their related affiliates and
14 respective successors and assigns, and shall inure to the benefit of each of the persons and
15 entities named herein, each of their heirs, administrators, representatives, executors, successors
16 and assigns.

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19. This Agreement embodies the entire Agreement between the parties hereto. All prior understandings and agreements by and between the parties hereto are merged into and superseded by this Agreement and no party released herein shall be bound by or liable for any statement, representation, promise, inducement or understanding of any kind or nature not set forth herein. This Agreement is the product of negotiation and preparation by and amount the parties hereto and their attorneys, if any. Therefore, the parties acknowledge and agree that this Agreement shall not be deemed to have been prepared or drafted by one party or another, and that it shall be construed accordingly. In the event that one or more of the provisions, or portions of this Agreement is determine to by illegal or unenforceable, the remainder of this Agreement shall not be affected hereby and each remaining provision or portion thereof shall continue to be valid and effective and shall be enforceable to the fullest extent permitted by law.

RESPECTFULLY SUBMITTED.

Dated this 16th day of November of 2006

By: _____/s_____
 WAYNE E. MCBRIDE
 COLLECTION MANAGER
 OPERATING ENGINEERS TRUST FUNDS

Approved by:

Dated this 17th day of November of 2006

OPERATING ENGINEERS LOCAL UNION NO.
 3 TRUST FUNDS – MULTI-SERVICES

By: _____/s_____
 TRACY L. MAINGUY
 ATTORNEY FOR PLAINTIFFS
 OPERATING ENGINEERS TRUST FUNDS

Dated this 17th day of November of 2006

By: _____/s_____
 TRACY GLENN PHILLIPS, PRESIDENT
 THRETHEWAY, INC.

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1 Dated this 17th day of November of 2006

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3 By: _____/s_____
TRACY GLENN PHILLIPS, individually
4 and personally

5 **ORDER**

6 Based upon the above-stated Stipulation, which is incorporated herein and made an order
7 of this Court, judgment in the amount of \$331,578.86 will be entered forthwith by the Court
8 against Defendant TRETHERWAY, INC. and Defendant TRACY GLENN PHILLIPS.
9 Additionally, the Court will retain jurisdiction to enforce the terms of the Stipulation.

10 DATED: November 22, 2006

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MAXINE M. CHESNEY
12 UNITED STATES DISTRICT JUDGE
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